



North Delta CARES Action Committee

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OBJECTION OF NORTH DELTA C.A.R.E.S.
(Community Area Residents for Environmental Stability)

To Written Testimony and Exhibits submitted by Petitioners U.S. Bureau of Reclamation and California Department of Water Resources

I. INTRODUCTION

North Delta C.A.R.E.S. herein objects to the written testimony and exhibits submitted by Department of Water Resources ("DWR") and the United States Bureau of Reclamation ("BOR"), collectively referred to as ("Petitioners") in support of Part IA of the California WaterFix ("CWF") hearing for change in point of diversion, ("Change Petition").

Petitioners rely on testimony and exhibits grossly lacking in foundation and detail to support improperly asserted legal conclusions that the Change Petition will not cause injury to other legal users of water. Petitioners have been working on the BDCP, the failed precursor of the CWF, for over seven years. Petitioners were granted multiple extensions of time to submit their case in chief for Part IA. As part of its prehearing rulings the State Board directed Petitioners to submit succinct and identifiable evidence. Nevertheless, the testimony and exhibits submitted by Petitioners generally fail to satisfy even the less exacting evidentiary standards applied to administrative proceedings. Consequently, as set forth below, much of Petitioners' testimony and exhibits must be excluded.

II. PROCEDURAL OBJECTIONS

A. The Change Petition Proceeding is Premature and Should Not Commence Until the Final CWF EIR/EIS Has Been Completed and The Delta Protestants Have Not Had an Opportunity to Comment Upon Same.

In the Fall of 2015 North Delta C.A.R.E.S., along with other Protestants, submitted significant and specified comments on the partially recirculated Draft Environmental Impact Report Supplemental Draft and Environmental Impact Statement ("RDEIR/SDEIS"). North Delta C.A.R.E.S., along with other Protestants, have consistently asserted that the Change Petition cannot go forward in advance of the certification of the RDEIR/SDEIS. It appears clear that without final EIR/EIS Petitioners cannot satisfy Water Code section 1702.2(d) which mandates that the Change Petition provide enough information to demonstrate a reasonable likelihood that the request will not injure any other legal users of water.

B. The Change Petition Should Not Proceed until the State Board has Updated the Bay Delta Water Quality Control Plan.

The triannual review is long overdue. Consequently, D1641 is long overdue for an update. Therefore, it is premature for the Change Petition to proceed before the Bay Delta Water Quality Control Plan is fully updated. Due process is often inconvenient and Petitioners are proceeding without a valid legal basis at this juncture.

C. The CWF and the Change Petition Should Not Proceed Because There Has Been No Economic and Financial Feasibility Analysis Showing the Project is Viable or Realistic

Both economic and financial feasibility are always a critical part of this feasibility analysis. Per DWR and federal guidelines, minimal elements of these are a financial plan that includes a cost allocation, and evidence that the petitioners can meet the financial requirements of the plan under the proposed operations. Benefit-cost analysis is also typically included in feasibility studies, although guidelines do not require the choice of the project with the highest net benefits or benefit-cost ratio, especially if there are financial constraints.

None of the BDCP/WaterFix documents submitted as evidence in this proceeding include a complete financial plan. In the limited economic and financial modeling completed in documents not submitted as evidence it is clear that the project is not feasible at the minimal water yields included in the EIR/EIS.

In addition, the evidence and testimony submitted to date have ignored whether the proposed drought year operations are financially feasible. Key to the environmental approval of the proposal is that it will not take any additional water, and potentially less, in dry years. Dry years place water agencies under considerable financial stress because their revenue from water sales drops precipitously. Because of this, the key question in the financial plan and feasibility analysis is the ability of the petitioners to meet their financial obligations under severely constrained dry year operations. Failure to submit adequate financial evidence and testimony preclude the Change Petition from moving forward as the Petitioners have failed to show the project is feasible as required by the State Board.

III. EVIDENTIARY OBJECTIONS

Administrative hearings and discovery procedures are governed by the Water Code (Wat. Code, § 1075 et seq.) and SWRCB regulations (Cal. Code Regs., tit. 23, §§ 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov. Code, § 11400 et seq.), Evidence Code sections 801-805 and the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.). Government Code section 11513 provides that administrative hearings are not conducted according to technical rules relating to evidence and witnesses, but relevant evidence must be "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513(c).) Under administrative standards of admissibility, "the evidence must be relevant and reliable." (*Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.)

California Code of Regulations Title 23 sections 794(a)(6) and 794(a)(9) requires Petitioners submit adequate information to fully explain proposed diversion, release and return flow schedules and the identification "in quantitative" terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s). Moreover, in their February 11, 2016 pre-hearing ruling, the hearing officers reiterated Petitioners' obligation to provide said information "in a succinct and easily identifiable format." (Feb 11, 2016 Ruling at P. 7). The hearing officer's admonishment was not the first directive issued to Petitioners regarding the submission of exhibits and testimony. The Notice of Petition ("Change Petition") issued by the State Board on October 30, 2015 provided that all parties' exhibits based on

technical studies or models be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models." (See Change Petition at p. 33.)

A. Petitioners Did Not Submit Complete Computer Modeling or Sufficient Information upon Which Key Witness Testimony is based.

The Petitioners have provided several models as evidence to part IA of the hearing. They claim that this set of models will allow for a thorough evaluation of the analysis that was conducted of the Preferred Alternative, 4A. This set of models is (1) incomplete, and (2) insufficiently documented, and (3) has not been peer reviewed by the scientific community to determine the accuracy or the appropriateness of the models as modified for CWF. Required components of the DSM2 model were not provided in the exhibits by the Petitioners. Requests made to DWR have resulted in the receipt of files that will allow the models to run, but there is no easy way to verify that these were the versions of the files that were used in the Petitioners analysis. The Variable Infiltration Capacity hydrology model and input data that was used to evaluate the future scenarios for climate change conditions was not included in the model exhibit. This hydrology model provided the input to the CALSIM II model. The UnTRIM model that was used in the analysis of tidal influence and salinity relationships at the Delta boundary was also not provided in the exhibits. It is a proprietary model and is not available to the public, so therefore the results from that analysis cannot be verified.

The analysis of the CFW was conducted for the No Action Alternative, and 4 separate scenarios, H3, H4, Boundary 1 and Boundary 2. Although those scenarios are loosely defined in the documentation provided by the Petitioners, there is insufficient information provided to independently recreate the conditions for those 4 scenarios. Boundary 1 and Boundary 2 are supposed to provide upper and lower ranges for the model operating scenario, yet there is no documentation provided to verify that those scenarios truly represent the upper and lower operational extremes. With the above models, and model components, being omitted from the evidence submitted by Petitioners, there cannot be a true evaluation of a modeling system that was used in the analysis of the CWF. Without being able to independently evaluate all of the models used in the analysis, North Delta CARES cannot verify that the Petitioners evaluation of the different alternatives is correct. Thus there is no way to independently evaluate the potential for injury to existing water users in the Delta.

In addition, the Revised Document EIR/EIS states, “As was true at the time the Draft EIR/EIS was issued, the existence of a preferred alternative – or a proposed project – does not mean that the remaining alternatives from that document are no longer under active consideration. The choice of a preferred alternative is purely provisional and subject to change.” (Identification of a Preferred Alternative – 1.1.3. Page 1-6, L 29-33) With this statement in mind, computer modeling would need to be submitted for all Alternatives represented in the CA WaterFix.

For example, one of the Alternatives is located a few miles south of the newly requested intakes; “Two 7,500 cfs intake structures and two pumping plants would be constructed under Alternative 9. These intakes would be located where the Sacramento River meets the Delta Cross Channel and Georgiana Slough; the pumping plants, which include their own small intake structures, would be located on the San Joaquin River at the head of Old River and on Middle River upstream of Victoria Canal. However, these facilities differ substantially from those that would be incorporated into other alternatives.” (North Delta Intakes – Appendix A, 03 Alt. – Introduction – 3.6.1.1. Page 3-27, L 29-34). More specificity and modeling needs to be offered to the People in order to appropriately prepare for the Hearing.

Also, based on the models that Petitioners entered into exhibit, the CALSIM II model was run over an 82 year period of record (1922-2003), but the DSM2 model was only evaluated for an 18 year period (1975-1991). The shorter 18 year period is too short to provide for an accurate statistical analysis of the high and low water year extremes. For example, the 10% exceedance flow for the 8-river water index is 11.2 MAF for the 1920-2015 periods. The 10% exceedance flow for the 8-River flow index is 9.5 MAF for the 1975-1991 periods. That is a 16% difference in that low flow statistic using the two different periods. For those same two periods, the 90% exceedance high flow statistic differs by 19%. The period of analysis for the DSM2 model that the DWR has provided into evidence is not long enough to provide for accurate results to represent low and high flow conditions.

Petitioners attempt to summarize the complicated results and assumptions of the modeling through the testimony of Armin Munevar through (DWR 71 and DRW 514.) However, in addition to the fatal flaws in the modeling provided as described above, neither of these exhibits or testimony is

supported or explained by a report or memorandum describing the modeling assumptions, approaches, methodology used to determine impacts on storage levels, channel elevations or water quality. By failing to submit complete modeling as evidence, or to include necessary supporting reports or memorandums associated with same, Petitioners have not complied with the requirements of the Notice of Petition, subsequent pre-hearing rulings or with section 794 as set forth above. Any of Petitioners testimony which relies in whole or in part on the modeling should be excluded.

The testimony of Armin Munevar (DWR 51) is central to Petitioners' case in chief. However, said testimony acknowledges that the subject modeling does not reflect the actual operations which will occur pursuant to the Change Petition and the CWF. Thus, there is no basis upon which Petitioners can base their claim that injury will not result to other legal users of water.

Moreover, the modeling prepared to support Petitioners' case in chief does not represent the best available science. As been pointed out by other Protestants the past several months, there has been no comprehensive formal review of the CalSim II or DSM2. In 2006 the model was peer reviewed by an assembled panel of modeling experts. The panel ultimately declined to approve use of the model and pointed out significant needed changes. North Delta CARES is informed that such changes have not been made and to the extent the model has been adjusted it has not subsequently been peer reviewed. Consequently, the model simply does not represent the use of best available science.

B. Opinion Testimony Contending the Change Petition Will Not Cause Injury to Other Legal Users of Water is Improper and Must Be Excluded.

An expert's opinion may be based on his or her own observations and examinations, or on matters "made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon" by experts in forming opinions on the particular subject ... "unless an expert is precluded by law from using such matter as a basis for his opinion." (California Evidence Code§ 801)

Although experts are given considerable leeway concerning the matters on which they may rely, they may not rely on speculation or conjecture. (Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1526; Sargon Enterprises, Inc. v. University of Southern Calif. (2012) 55 Cal.4th 747, 769-

772, 781 - "trial court properly acted as a gatekeeper to exclude speculative expert testimony" (emphasizing trial courts' "substantial 'gatekeeping' responsibility" in excluding inadmissible expert testimony under Ev. C. § 801 (b), governing judicial review of type of matter-and § 802, governing review of reasons for expert's opinion); *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1331 "(W)hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (internal quotes omitted))

Expert opinion testimony must be excluded if the matter relates to an issue of law, such as the proper interpretation of a deed, contract, statute, etc. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 -whether duty exists; see *Howard Jarvis Taxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679, 689-whether tax assessment exempt from Prop. 218)

Petitioners' conclusions that CWF will not result in injury to other legal uses of water is wholly lacking in foundation and an improper attempt to influence the hearing offices with legal opinion testimony. Maureen Sergent (DWR 53) testifies on several occasions that the Change Petition does not represent a new water right and that the operation of the CWF will not injure other legal users of water (See DWR 53 P. 3). These are both ultimate questions of law for the hearing officers to decide and Ms. Sergent's opinions should be excluded. Moreover, Ms. Sergent is an engineer. She does not have the expertise to support her opinions related to these highly involved legal issues.

Even if the hearing officers were for some reason inclined to allow such testimony from a proffered engineering expert on the ultimate legal questions, Ms. Sergent's testimony must be excluded because it admittedly is built upon the testimony of Mr. Leahigh (DWR 61), Dr. Nader-Tehrani (DWR) and Mr. Munevar (DWR). Mr. Leahigh's testimony describing decisions related to the timing and quantities of water deliveries is based on speculative projected hydrologic and hydrodynamic information rather than actually known proposed operations. Thus, Mr. Leahigh's testimony is too speculative and uncertain to be relevant and useful. The testimony of Dr. Nader-Tehrani and Mr. Munevar is based on CalSim II and DSM2 modeling which lacks proper verification, validation, accreditation and peer review.

Therefore, the legal conclusions and opinions asserted by Ms. Sergent are built upon evidence which itself must be excluded.

John Leahigh is the Chief of the State Water Project Operations Office and his expertise is in civil engineering. Nevertheless, he testifies that it is his opinion that the Projects will continue to meet existing Delta water quality and fishery objectives and any additional regulatory requirements related to the CWF at a similar rate demonstrated historically. This opinion testimony is beyond this witness's expertise and thus there is no legal basis for same. Said testimony is purely speculative and assumes facts not in evidence and therefore must be excluded. Mr. Leahigh further testifies on several occasions that "My opinion is that regulatory compliance with the CWF will be at least as good, if not better, as today given that CWF will add infrastructure flexibility to the system operations." (DWR 61 p. 7 and 17). This testimony assumes facts not in evidence, offers an improper legal opinion, is gratuitous, speculative, and highly irrelevant and must be excluded. This witness's testimony also relies on the testimony of Dr. Nader-Tehrani and Mr. Munevar, which in addition to the reasons set forth above, is irrelevant because Mr. Munevar acknowledges that the models cannot "reliably predict specific operations." Unfortunately, Petitioners are making a specific and monumental request for a Change Petition and if they can't provide modeling information with minimum specificity, they cannot meet their legal obligation to demonstrate no injury to other legal user of water.

Mr. Leahigh and Mr. Nader-Tehrani also opine that small changes in Delta salinity will not have any effect on agricultural beneficial uses. However, neither witness recognizes that southern Delta water quality objectives are regularly exceeded nor neither have any expertise as to what effects result from differing water quality. Further, testimony by DWR witnesses, including, Mr. Leahigh, that Petitioners will continue to meet existing Bay-Delta water quality standards assumes facts not in evidence, is speculative, and irrelevant.

Moreover, testimony by witnesses regarding their opinions that Petitioners will continue to meet existing Bay-Delta requirements is wholly inadequate and squarely contradicted by Petitioners own testimony. Pursuant to the Biological Statement submitted by Petitioners as part of the concurrent Biological Assessment process, Petitioners anticipate seeking relief from any existing permit conditions/Bay-Delta standards after one year of dry or critical conditions followed by four months of dry or critical conditions (see

Section 3.7.2). This situation has occurred approximately 16 times between 1922 and 2015, which is 17% of the years. Hence the Petitioners in their own submittal tell the Board that 17% of the time they will operate in some unspecified manner and other than what their evidence, testimony and modeling set forth. Without knowing how they plan to operate during approximately 17% of the time, there is simply no basis by which to judge if the project will injure any other legal user of water.

IV. JOINDER IN OTHER PROTESTANTS' WRITTEN OBJECTIONS

North Delta C.A.R.E.S. also joins in, adopts and incorporates by reference the objections and motions to exclude evidence submitted by other Protestants as identified below. North Delta C.A.R.E.S. expressly reserves their rights to object to additional evidence Petitioners may later offer in connection with Part IA of the hearing as well as to any evidence Petitioners submit in support of Part 2 of the CWF Hearing. Further, North Delta C.A.R.E.S. reserves their express right to lodge additional objections and to make further motions at the time of the hearings for Part IA of the CWF Proceedings. Finally, while some of the objections set forth herein, as well as those herein incorporated by reference, might go to the weight of the testimony as opposed to strictly pertaining to exclusion of evidence, North Delta C.A.R.E.S. reserves their right, consistent with the June 10, 2016 ruling, to submit objections pertaining strictly to the weight of the evidence at a later time.

- The County of San Joaquin;
- The Delta Protestants;
- Sacramento Valley Water Users;
- Save the California Delta Alliance;
- Friends of the River;
- Sierra Club California;
- AquaAlliance;
- Pacific Coast Federation of Fisherman's Associations;
- Institute for Fisheries Resources;
- Earthjustice; and
- Restore the Delta

V. CONCLUSION

Other than providing information about current operations and general background, the witness testimony submitted by Petitioners is wholly inadequate, conclusory, lacking in foundation, and based on improper and irrelevant legal conclusions. The modeling information submitted by Petitioners is incomplete, unclear and largely unexplained. Thus, it must be excluded and any witness opinions based on same must also be excluded. North Delta C.A.R.E.S./Barbara Daly reserves the right to further object to all other statements, documents and witnesses offered by the Petitioners. Additionally, the Change Petition is grossly premature and should be delayed until after the final EIR/EIS and the Bay-Delta Water Quality Control Plan are completed.

Thank you,

Barbara Daly

Barbara Daly (for)
North Delta C.A.R.E.S. Action Committee